

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into by and between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB"), with its principal office at 1001 I Street, Sacramento, California 95814 and MERCURY TOURS, with its principal office at 180 South Linden Avenue, South San Francisco, CA 94080.

RECITALS

- (1) *California Health and Safety Code (H&SC)* Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).
- (2) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.
- (3) Title 13, CCR sections 2190 et seq. were adopted under the authority of *H&SC* section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel-powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.
- (4) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based truck fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.
- (5) Title 13, CCR section 2192(a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193(a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

- (6) *H&SC* Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars (\$500) per vehicle."
- (7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) MERCURY TOURS, failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for 2009 in violation of Title 13, CCR Sections 2190 et seq.
- (9) The ARB alleges that if the facts described in recital paragraphs (1) – (8) were proven, civil penalties could be imposed against MERCURY TOURS, as provided in *H&SC* section 43016.
- (10) MERCURY TOURS is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation.

TERMS & RELEASE

In consideration of ARB not filing a legal action against MERCURY TOURS, for the violations alleged above, ARB and MERCURY TOURS, agree as follows:

- (1) Upon execution of this agreement, MERCURY TOURS shall pay a civil penalty of four thousand five hundred dollars (\$3,500). Payment shall be made in check form as described below and the full amount shall be submitted.
 - \$2,625.00 made payable to the **California Air Pollution Control Fund**.
 - \$ 875.00 made payable to the **Peralta Community College District**.

All payments and documents shall be sent to the attention of:

David C. Gray
California Air Resources Board, Enforcement Division
P.O. Box 2815
Sacramento, CA 95812

- (2) MERCURY TOURS shall not violate *H&SC* Sections 43701 et seq. and 44011.6 et seq. and Title 13, CCR Sections 2180 et seq., 2190 et seq., and 2485 et seq.

- (3) MERCURY TOURS shall comply with one or both of the following options, to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB's webpage at www.arb.ca.gov/msprog/hdvp/hdvp.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.
- (a) MERCURY TOURS shall have at least one staff member responsible for compliance with the PSIP and the HDVIP attend the CCDET class. Proof of CCDET completion shall be provided to ARB within one year of the date of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by MERCURY TOURS, rules, regulations, codes or ordinances, whichever is longer.
- (b) If MERCURY TOURS uses a contractor to perform the annual smoke opacity testing required under the PSIP, MERCURY TOURS, shall obtain proof that the contractor's staff conducting the smoke opacity test completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.
- (4) MERCURY TOURS shall submit copies of all PSIP compliance records for years 2011 and 2012 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of David C. Gray at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812. The ARB reserves the right to visit any MERCURY TOURS, fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (5) MERCURY TOURS, shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California no later than 45 days after an engine requiring reflash to comply with ARB emission standards is identified or included in its fleet.
- (6) Each heavy-duty commercial vehicle in MERCURY TOURS, fleet shall have proof that its engine meets emissions standards at least as stringent as U. S. federal standards for its model-year by having a manufacturer's emission control label (ECL) properly affixed to the engine within 45 days of this agreement.
- (7) MERCURY TOURS shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of this Agreement.

- (8) This Agreement shall apply to and be binding upon MERCURY TOURS, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (9) Now, therefore, in consideration of the payment by MERCURY TOURS, in the amount of three thousand five hundred dollars (\$3,500.00), ARB hereby releases MERCURY TOURS, and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) through (8) above. The undersigned represent that they have the authority to enter into this Agreement.
- (10) This Agreement constitutes the entire agreement and understanding between ARB and MERCURY TOURS, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and MERCURY TOURS, concerning the subject matter hereof.
- (11) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (12) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (13) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.

California Air Resources Board

By :

Name: James Ryden

Title : Chief Enforcement

Date :

1/10/11

Mercury Tours

By :

Name : JAKE JACOBSON

Title : PRESIDENT

Date : 12-28-2010